United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-6049-50-59

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CITY OF HARTFORD, MIRIAM JORDAN and FANNIE MAULDIN,

Plaintiffs-Appellees,

v.

TOWNS OF GLASTONBURY, WEST HARTFORD and EAST HARTFORD,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES ON REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Statutes:

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Statement of the Issue

The issue considered in this brief is whether the City of Hartford and the individual appellees have standing to bring this suit.

Statement of the Case*

Plaintiffs-appellees filed their complaint on August 11, 1975 challenging the approval by the Federal Department

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* As noted on p. 13 *infra*, appellees are limiting their discussion to the issue of standing and this brief therefore is a supplement to appellees' first brief.

of Housing and Urban Development (HUD) of grants in aid to seven suburban Hartford communities. These grants were awarded pursuant to the Housing and Community Development Act of 1974, Public Law 93-383, 42 U.S.C. § 5301, et seq. Plaintiffs' primary claim was that HUD violated the terms of the 1974 law in approving the grants in light of the inadequacy of the applications for funding with respect to commitments for lower cost housing.

Simultaneously with the filing of the complaint, the plaintiffs moved for a preliminary injunction restraining HUD from disbursing any of the monies approved pursuant to the challenged grants to the seven towns. On August 26, 1975 the court granted motions by HUD and the seven towns to join the towns as defendants. On September 22-24, 1975, a hearing was held in which plaintiffs' motion for a preliminary injunction and the trial on the merits were consolidated. On September 30 the district court granted plaintiffs' application for preliminary injunction, enjoining the towns from drawing upon the federal treasury or expending funds pursuant to the challenged grants. On January 28, 1976, the district court rendered its final decision making permanent the injunction previously entered (for a fuller description of the proceedings below see appellees' first brief, pp. 3-9).

The district court held that HUD had violated the 1974 Act in the case of six of the towns by approving grants notwithstanding the fact that the applications had failed "to make any assessment whatsoever of the housing needs of low and moderate income persons who might be 'expected to reside' within their borders" (A73). The Court held that the assessment of the expected to reside figure was a required and non-waivable aspect of the application for community development funds. The assessment was to be contained in the housing assistance plan (HAP) of the application (A73). That determination resolved the claims of appellants West Harford and Glastonbury.

With respect to East Hartford, the issue was somewhat different, as that town had submitted an expected to reside estimate. The district court found, however, that the figure was legally inadequate, having been based exclusively on the town's waiting list for public housing units. The court held that "HUD had a duty to do more than accept any 'expected to reside' figure proposed by East Hartford, however inadequate its size or derivation. The administrative record discloses that it did not live up to that duty" (A86-87).

The district court enjoined the towns from drawing funds from the United States Treasury pursuant to the challenged grants. The court specifically noted, however, that the defendant towns could resubmit their grant applications to HUD, and the district court would lift the injunction for any town which filed an acceptable revised HAP (A88).

Three of the towns, East Hartford, West Hartford and Glastonbury, filed appeals. HUD chose not to appeal and filed a brief *amicus curiae* with this Court. On December 23, 1976, a panel of this Court affirmed the district court ruling. Judge Meskill filed a dissenting opinion. On February 8, 1977 this Court granted the appellants' petitions for rehearing en banc. On February 23, 1977, this Court addressed several questions to the parties relating to whether the appellant towns had reapplied to HUD for their 1975 grants pursuant to the terms of the district court injunction and the result of any such reapplication. Those questions are fully set out and responded to on pp. 13-14, *infra.*

Statement of the Facts

Appellees' first brief contains a detailed statement of the application process engaged in by the seven defendant towns leading up to the award of the challenged grants. That brief also contains a discussion of the nature of the

appellant communities and a summary of the social, economic and housing problems confronted by Hartford. Those discussions will not be repeated in this brief, but certain factual matters particularly relevant to the standing issue will be summarized. In this regard, the goals of the Housing and Community Development Act of 1974 are critical.

The Goals of the Housing and Community Development Act of 1974.

The Housing and Community Development Act of 1974 is addressed primarily to the needs of low and moderate income persons. Congress stated that its "primary objective" in enacting the 1974 law was:

> the development of viable urban communities, by providing decent housing and a suitable environment and expanding economic opportunities, principally for persons of low and moderate income. 42 U.S.C. § 5301(c)

To insure that funds pursuant to this law would further this objective, Congress set seven specific goals for community development grants, stressing that the Federal monies be used principally for persons of low and moderate income and for housing or housing related activities. 42 U.S.C. § 5301(c)(1)-(7).

A major concern set forth by Congress in the 1974 Act related to the concentration of lower income persons in inner city areas. The statute opened with a declaration by Congress that the "Nation's cities, towns and smaller urban communities face critical social, economic, and environmental problems in rising and significant measure from —(1) the growth of population in metropolitan and other urban areas, and the concentration of persons of lower income in central cities . . ." 42 U.S.C. § 5301(a). One of the seven specific goals for the use of the community development funds is to promote:

> *the reduction of the isolation of income groups within communities and geographical areas* and the promo-

> tion of an increase in the diversity and vitality of neighborhoods through the *spatial deconcentration of housing opportunities for persons of lower income* and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income. . . . 42 U.S.C. § 5301(c)(6) (emphasis added).

Pursuant to Title I of the 1974 Act, Congress established a consolidated block grant program whereby local communities may obtain community development funds to undertake a variety of possible programs and projects outlined in the law. See 42 U.S.C. § 5305. Title I replaces the earlier HUD categorical development programs. The type of programs permitted under the new law indicates an overriding concern by Congress for relieving the plight of low and moderate income persons residing in urban communities.

Title I community development grants themselves may not be used for construction of new low cost housing, although housing rehabilitation and other housing related activities are permitted. 42 U.S.C. § 5305. New low cost housing construction monies are available, however, under Title II ("Assisted Housing") of the legislation. See, 42 U.S.C. § 1437(g). Furthermore, Congress stated that in providing community development funds, it sought to create "a consistent system of Federal aid" which promotes the achievement of the goal of "a decent home and a suitable living environment for every American family" and which "fosters the undertaking of housing and community development activities in a coordinated and mutually supportive manner." 42 U.S.C. § 5301(d)(3)-(4).

The Housing Assistance Plan—the Means for Promoting Low Cost Housing Opportunities

By merging the categorical community development projects into the block grant program under the 1974 Act, Congress simplified the process whereby local jurisdictions may obtain federal funds and gave local communities

greater discretion in determining how the funds will be used. In light of this delegation of responsibility, however, Congress emphasized the importance of the application process. Applicant communities must detail their needs and set goals for meeting those needs. Thus, HUD is statutorily precluded from approving an application for Title I funds unless the applicant has submitted to the Secretary an application which "sets forth a summary of a three-year community development plan which identifies community development needs, demonstrates a comprehensive strategy for meeting those needs, and specifies both short-and long-term community development objectives which have been developed in accordance with area wide development planning and national urban growth policies." 42 U.S.C. § 5304(a)(1).

In order to ensure that the goal of expanded housing opportunities is accomplished, an applicant for Title I funds must submit a housing assistance plan as part of its application. Through its HAP, the applicant is to set forth certain basic information with respect to low cost housing. First, the HAP must contain an accurate survey of the condition of the housing stock in the community. The applicant must then assess "the housing assistance needs of lower income persons . . . [including those] residing in or expected to reside in the community." The applicant must also set forth "a realistic annual goal for the number of dwelling units or persons to be assisted" and, finally, indicate "the general locations of proposed housing for lower-income persons. . . ." 42 U.S.C. § 5304(a)(4).

With respect to assessing housing needs of lower income persons, the estimate as to "expected to reside" refers to lower income persons and families not currently living in the community but who would wish to do so because of economic or other opportunities. With respect to the requirement that the general locations of proposed housing for lower income persons be set forth in the HAP, the law provides that this be done with the objective of "promoting

greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons. . . ." 42 U.S.C. § 5304(a)(4)(C). As the majority of the panel in this Court stated, the "HAP serves as the vehicle tying together the community development and housing assistance portions of the Act, in furtherance of the Act's overall goal of coordination of federal urban efforts . . ." (Slip Op. 1088).

The City of Hartford and the Appellant Towns

The disparities between Hartford and the appellant towns which are suburbs of Hartford, are fully outlined in the appellees' initial brief (pp. 14-21). Generally, however, the appellant towns have predominantly white populations and economically range from being middle income communities to relatively affluent areas. All these communities have experienced in recent years commercial and industrial growth and currently have substantial employment opportunities for lower income persons. Nonetheless, in all three towns, housing is costly and generally unavailable to lower income workers.

The City of Hartford itself stands in marked contrast. Over half of the City's population is dependent upon public or general assistance benefits, or is living exclusively on Social Security or unemployment benefits (A146). Between 40-45% of the entire town general assistance caseload in the State of Connecticut is in the City of Hartford (A151). The unemployment is staggeringly high (A146). The great bulk of the minority population in the Hartford metropolitan region resides in the City itself. As of 1970, 35.5% of Hartford's population was comprised of minority citizens and that figure has since increased substantially (A148).

Hartford's housing stock is extremely depressed, with about 16,000 substandard units located in the City. Correction of this situation is difficult as the City is without sufficient vacant land for new housing construction and

lacks the financial resources for an adequate remedial program (A157). Furthermore, the great bulk of subsidized housing units in the greater Hartford region already are located in Hartford. Thus, 71% of all public housing units in the metropolitan region are in Hartford and over 60% of all subsidized units are in the City. Yet, Hartford still requires thousands of additional subsidized housing units to meet the current needs of its lower income population (A158).

The Application Process and the Meeker Memorandum.

In accordance with the requirements of the 1974 Act, appellants' applications for Title I funds were first filed with the area-wide planning agency for the Hartford region, the Capitol Region Council of Governments. See, 42 U.S.C. § 5304(e). Several civil rights groups and the City of Hartford commented on the applications. Substantial concern was expressed at this level of review, as well as at HUD, due to the inadequacy of housing goals and plans for lower income persons in the applications of the suburban communities. The final day for submissions of applications to HUD was April 15, 1975.

On May 21, 1975, the normal review process with respect to the HAP portion of the applications was interrupted. On that day a memorandum was issued from David O. Meeker, Jr., Assistant Secretary for Community Planning and Development at HUD, to all area and regional offices advising that procedures with respect to completion of the expected to reside table of the HAP were being revised. Mr. Meeker stated that applicant communities would be given the option of not completing the expected to reside table of the HAP during the first year of the program (A139). Appellants West Hartford and Glastonbury took that option and submitted zero expected to reside figures in their HAPs. East Hartford's application had been approved by HUD prior to the Meeker Memorandum, and that town had a figure of 131 as its expected to reside need.

The Current Position of HUD

As noted above, HUD chose not to appeal from the district court ruling, filing instead a brief, *amicus curiae,* with this Court. In its brief, HUD stated, "The Secretary has not appealed in this case because the *result* reached by the District Court is not inconsistent with the present practices adopted by HUD subsequent to the administrative determination challenged in this litigation and because the Court's opinion can be read in a manner consistent with the Department's interpretation of its duties under the Act" (HUD Br., p. 3). Commenting on the district court's ruling that HUD lacked the authority to waive the expected to reside table for year one of the community development program, HUD stated in its brief that it "does not appeal that holding" (HUD Br., p. 16). HUD also took specific exception to statements by West Hartford and Glastonbury that under the Act these appellants could limit their community development and housing efforts exclusively to the benefit of their own residents. The Government stated that such an approach would not be countenanced (HUD Br., p. 23, n. 12).

Following the district court ruling, HUD adopted new detailed regulations on how applicants are to complete the expected to reside table. 24 CFR 570.303(c)(2)(i) and (ii), as amended, 41 Fed. Reg. 11128 (March 16, 1976). The new regulations present a detailed formula whereby applicants are to derive reasonable figures for anticipating housing needs of persons expected to reside in the community as a result of new and expanding employment opportunities.

The Opinion of the Panel

The majority of the panel which heard this appeal held that the district court opinion should be affirmed in all respects.

Judge Oakes, writing for the majority, distinguishing the instant case from this Court's *en banc* ruling in *Evans* v. *Lynn,* 537 F.2d 571 (2d Cir. 1976), *cert. den.* 45 U.S.L.W. 3489 (January 18, 1977), held that the appellees in this case have standing to challenge the propriety of the grants to the appellant communities. With respect to the City of Hartford, Judge Oakes stated that a clear showing of injury in fact was established in light of the City's financial stake in the outcome of the litigation. Judge Oakes noted that should the funds challenged in this case be denied to the appellant communities, under HUD regulations they would be available for reallocation within the Hartford metropolitan area and Hartford itself could apply and possibly obtain those monies. "The strong likelihood that Hartford will receive reallocated funds, while not an absolute certainty, is therefore sufficient to establish that Hartford will 'benefit in a tangible way from the courts' intervention'" (Slip Op. 1093).

Judge Oakes stated that Hartford also was plainly injured by HUD's waiver of the provisions of the 1974 Act requiring suburban towns to file adequate expected to reside figures. Observing that the expected to reside requirement related to the congressional goal of securing spatial deconcentration of lower income groups within geographic areas, Judge Oakes emphasized that HUD's waiver substantially lessened the probability that suburban towns would use federal funds to promote that objective. The Court stated, "The critical importance of the HAP in the overall scheme of the 1974 Act is underscored by the Act itself and in the legislative history; it has been recognized by HUD and was fully appreciated by the Court below" (Slip Op. 1088-89). Since Hartford clearly met the standard of a city with a high concentration of lower income persons and inadequate housing, failure to promote the deconcentration goal in Hartford suburbs injured the city.

Since it was clear from the stated objectives of the 1974 Act that Congress sought to ameliorate the problems con-

fronted by inner cities, the majority of the panel had little difficulty in finding that Hartford came within the zone of interests protected by the legislation.

Judge Oakes noted that in light of the *Evans* v. *Lynn, supra* and *Warth* v. *Seldin,* 422 U.S. 490 (1970) decisions, a "more difficult issue" was presented with respect to the claim to standing by the low income Hartford residents. The majority concluded, however, that *Evans* and *Warth* were distinguishable from the claims of the individual appellees here as the 1974 law was clearly "designed to protect persons in the plaintiffs' situation, and the approval of applications lacking legitimate 'expected to reside' figures in the HAPs appears to have directly injured the plaintiffs, since the HAPs were expected to lead to greater low-income housing opportunities on a deconcentrated, regional basis . . ." (Slip Op. 1098). Furthermore, unlike the situation in *Evans,* reallocation of the challenged grants could result in Hartford obtaining funds which in turn would inure to the benefit of the individual appellees since such funds must be used primarily for the needs of low and moderate income citizens.

Turning to the substantive issues, Judge Oakes referred to the fact that HUD in its *amicus curiae* brief did not take issue with the district court's finding that the waiver of the expected to reside requirement violated the terms of the 1974 Act. The Court noted that the Act itself could not be clearer and that the Secretary, while permitted to waive certain provisions of the application requirements, was not authorized to waive the HAP application provisions. "The conclusion is virtually inescapable that the Secretary lacked discretion to waive the HAP requirement" (Slip Op. 1101). The Court also noted that the expected to reside figure constituted the keystone to the spatial deconcentration objective of the Act and that the waiver of that aspect of the HAP form severely undermined the entire HAP.

The panel, in concluding that HUD could not waive a part of the HAP, agreed with the district court that West

Hartford and Glastonbury's applications could not be upheld. With respect to East Hartford, the panel again concurred with the district court, holding that HUD made an error of judgment in not independently investigating that appellant's expected to reside submission. "A suburban town's attempt to ascertain the housing needs of future residents from a waiting list for a limited supply of public housing units is certainly sufficiently questionable to require some further verification" (Slip Op. 1104). Judge Oakes stated that the Court agreed that the Secretary acted in an arbitrary and capricious fashion in approving East Hartford's application. Finally, Judge Oakes noted that the remedy fashioned by the district court was well within the equitable powers of the Court.

Judge Meskill in his dissenting opinion took issue only with the majority's view that the plaintiffs have standing to sue. With respect to Hartford, Judge Meskill questioned the City's financial stake in the challenged funds. ". . . [A]lthough Hartford may have proved that it would have a priority position in applying for reallocated funds, it has failed to prove that the intervention of the federal courts will result in the availability of funds for reallocation" (Slip Op. 1109). Judge Meskill also challenged Hartford's claim to standing based on the injury sustained as a result of HUD's non-enforcement of the spatial deconcentration objective of the 1974 legislation, arguing that Hartford's bleak housing situation cannot be traced to the actions of the defendants. Judge Meskill further stated that it is remote and speculative whether inclusion of the expected to reside figure in the HAPs will result in better housing in Hartford and whether the City could "properly assert an interest in improving its bleak housing situation in an action against the federal government" (Slip Op. 1111).

With respect to the low income individual plaintiffs, Judge Meskill stated that while the *Warth* and *Evans* rulings are distinguishable from the facts in the instant

case, the "distinctions are not great enough, in my judgment, to justify the conclusion reached by the majority" (Slip Op. 1112). Judge Meskill concluded that, since the injury suffered by the individual plaintiffs is a continuing one which antedated the filing of this case, "they would have standing only if they can allege that their injury has been, or will in fact be, perceptibly aggravated by the challenged action" (Slip Op. 1113). According to Judge Meskill, HUD's deviation from the law did not worsen plaintiff's situation—it merely left it the same.

ARGUMENT

Introduction

In the context of this *en banc* rehearing, counsel for appellees anticipate that it is the issue of standing which will most concern this Court. Accordingly, the argument in this supplemental brief is devoted entirely to demonstrating the panel's decision that the appellees have standing is correct and entirely consistent with *Warth* v. *Seldin, supra,* and this Court's *en banc* decision in *Evans* v. *Lynn, supra.* As to the other issues before the panel on appeal and before the Court *en banc* in this rehearing, the Court is respectfully referred to appellees' initial brief on appeal.

There is, however, one prefatory matter suggested by the questions propounded to the parties by the Court. These questions and appellees' responses are as follows:

1. Have the appellant Towns satisfied the "expected to reside" requirement for fiscal 1975?
2. If so, have the appellant Towns re-applied to the lower court for modification of the decree as set forth at page 1105 of the panel majority opinion?
3. If not, what has happened to the funds in question?

Following the issuance of the district court injunction, appellants Glastonbury and West Hartford filed revised

expected to reside figures with HUD in conjunction with their application for 1975 community development funds. East Hartford did not submit a revised HAP.

On March 7, 1977, defendant HUD filed a Notice of Compliance with the District Court's Decision of January 28, 1976. With this notice, HUD submitted to the district court the revised West Hartford and Glastonbury HAPs and advised the court that HUD had approved the resubmissions. On March 17, 1977, the appellees wrote to the district court stating that they did not intend to contest the revised West Hartford and Glastonbury HAPs and would not object to the release of the 1975 grant funds to those towns. To date, the district court has not acted upon these resubmissions. Appellees assume that all the challenged funds remain with the Treasury Department pending final resolution of this case.

The issue of mootness necessarily emerges from the circumstances to which the questions of the Court point. It is the position of the appellees that no portion of this case is moot. Certainly the issues are not moot as to East Hartford which has not reapplied for funds in accordance with the injunction. As to West Hartford and Glastonbury it is the appellees' view that the issues raised in this appeal are of critical national importance and are capable of repetition. Therefore, it is the appellees' view that this aspect of the case is not moot as it comes within the principles set forth in *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974) and *Nebraska Press Ass'n* v. *Stuart,* 44 U.S.L.W. 5149 (June 30, 1976).

The City of Hartford and the Low Income Appellees Have Standing to Sue

Both the district court and the majority of the panel in this Court held that the City of Hartford and the low income appellees have standing to bring this action. It was

concluded that appellees suffered both injury in fact as a result of HUD's failure adequately to enforce the provisions of the 1974 Act and that they came within the zone of interest protected by that legislation. It is the appellees' position that these conclusions are legally sound and are entirely consistent with the decisions in *Evans* and *Warth*. For this Court to adopt an opposite view would have the effect of subverting the goals and purposes set by Congress in the 1974 legislation.

1. The City of Hartford

Judges Oakes and Smith agreed with the District Court that the City of Hartford satisfied the "injury in fact" standard required to establish standing to sue. See, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Evans* v. *Lynn, supra*. Hartford's injury and interest in this matter relates to the City's financial stake in any reallocation of the challenged community development grants and in the loss of benefits expected to flow from the 1974 Law with respect to securing relief for inner city areas through geographic deconcentration of low cost housing.

There can be no doubt that Hartford has a clear statutory claim to any community development funds which may be reallocated as a result of the disapproval of the grants to the appellant towns. Pursuant to 42 U.S.C. § 5306(e) reallocation of funds made available as a result of the disapproval of community development grant applications are to be on a first priority basis to any metropolitan area in the same state. HUD regulations further refine the priority of reallocation of such funds to provide that distributions be first to the *same* metropolitan area where the funds were initially designated. 24 CFR § 570.409(d)(1).

Appellants contend that Hartford's position with respect to securing reallocated funds is no greater than any other

municipality within the Hartford metropolitan area. In reality, Hartford's claim to such funds is an overriding one within the region and its posture is clearly unique. As was shown in appellees' earlier brief, there is nothing in the record to support the claim that towns in the Hartford standard metropolitan statistical area (SMSA) other than those that applied for the 1975 funds, would even qualify for Title I funding. Significantly, as Judge Oakes noted, "Appellants' argument . . . does not recognize that HUD is unlikely to reallocate funds to localities that did not apply originally for community development funds in 1975; with these localities and the seven towns enjoined below eliminated from the reallocation pool, only Hartford and two other towns in the SMSA would remain eligible" (Slip Op. 1092).

In his dissent, Judge Meskill, in an effort to minimize the City's financial interest claim, argued that under the terms of the district court injunction, the appellant towns may complete their 1975 HAPs, reapply for, and obtain their 1975 grants. From this he concludes that, nothwithstanding Hartford's priority position in terms of securing reallocated funds, it is extremely unlikely that the City will ever see any of these dollars. Judge Meskill's reasoning leads, however, to the imposition of a most onerous standard. Certainly, a party need not show an absolute certainty of obtaining monies for which it stakes a claim before the courts will recognize a sufficient interest to grant standing. The City's interest should not be held to depend upon conclusive proof that the monies from the challenged grants will come to it by virtue of the litigation. The issue is whether Hartford has a meaningful potential financial claim at the outset of the litigation. In this regard, the Majority Leader of the Hartford Court of Common Council advised the district court, by way of affidavit in response to a motion to dismiss for lack of standing, that Hartford would apply for any of the 1975 community development funds that ultimately may become available as a result of this case. See, 408 F.Supp. at 885-886.

Hartford also meets the injury in fact test in relation to HUD's non-enforcement of the provisions of the 1974 Act. The Act was designed to promote spatial deconcentration of lower income persons. By HUD's non-enforcement, Hartford was denied the benefits of this deconcentration. As noted earlier, the expected to reside table of the HAP is the sole mechanism for promoting the congressional goal of spatial deconcentration of lower income housing opportunities in metropolitan areas. The spatial deconcentration objective is a direct congressional response to the fact that inner city areas are inundated with the social problems of housing deterioration, inadequate resources and a population suffering from economic dislocation. The HAP is the vehicle by which eventual construction of lower cost housing in suburban communities will be accomplished and by which the pressure on the inner cities will be relieved. The Title I provision for community development block grants is the available resource by which local communities are to be encouraged to participate in federal housing programs.

When HUD approved Title I funds for the appellant communities without requiring completion of the HAP expected to reside table, the appellant towns were relieved of their obligation to recognize a housing need for persons residing outside their jurisdictions. The operative means for accomplishing the spatial deconcentration goal and for lessening the onerous burden on the cities was thereby administratively negated. In the instant case, Hartford would have been the beneficiary of a program whereby its suburbs would have involved themselves in the process of deconcentration of lower income citizens.

Also it should be recognized that if one of the appellant communities is either denied its community development entitlement grant or determines not to partake in the program, Hartford itself would benefit from these reallocated funds even if the funds go to another municipality in the region. Any suburban town which receives these reallo-

cated funds will have been required to submit in its HAP an adequate expected to reside figure and commitment to low cost housing. If the statutory requirements are met, these reallocated monies will be used primarily for low and moderate income citizens and towards promoting deconcentration of low cost housing opportunities. Thus, Hartford and its lower income citizens will under any circumstance benefit from strict enforcement of the statutory directives.

There simply is no question but that Hartford comes within the zone of interest protected by the 1974 legislation. The fact that Congress stressed the social problems facing cities arising out of the pattern of "concentration of persons of lower income in central cities," 42 U.S.C. § 5301(a)(1), and emphasized an overall goal of revitalizing cities with the primary objective of developing "viable urban communities as social, economic and political entities . . .," 42 U.S.C. § 5301(c), underscores the validity of the district court's conclusion that the statute involved here was intended in substantial part to ameliorate problems faced by the City of Hartford (A47-48).

2. The Low Income Appellees

Appellees Miriam Jordan and Fanny Mauldin are low income residents of Hartford, who are confronted with housing problems and have been attempting, without success, to locate low cost housing units in suburban areas of Hartford. As Judge Oakes stated, these appellees easily meet the zone of interest test of the 1974 Act because the law was intended "to benefit principally 'persons of low and moderate income,' a phrase repeated throughout 42 U.S.C. § 5301(c) . . ." (Slip Op. 1097). Moreover, HUD's violation of the requirements of the 1974 Act related specifically to completion of a table which is an enumeration of the housing needs of lower income persons who currently are excluded from residing in suburban communities and who would choose to live in such areas.

In light of the *Warth* and *Evans* decisions, the more difficult issue faced by the individual appellees relates to their claim of an injury in fact. Judge Oakes distinguished *Warth* and *Evans,* however, by pointing to the fact that the low income appellees are asserting "a specific violation of a statute, not a generalized claim that a law is unconstitutional . . ." (Slip Op. 1098). Furthermore, the statute involved here was specifically designed to promote the interests of low income persons in need of alternative housing opportunities and would thus provide a tangible benefit to these appellees in that either there will be an impetus for creation of new low cost housing in the appellant suburbs or in other Hartford suburban communities, or additional funds may well be available to the City of Hartford to be used in projects principally for low and moderate income persons.

3. The Warth and Evans Decisions are Distinguishable in Light of the Clearly Articulated Congressional Policy in the 1974 Legislation

The argument that appellees lack standing is based largely on the contention that the benefit which will flow to them from enforcement of the HAP provisions is speculative. Those adopting this view read the *Warth* and *Evans* rulings as foreclosing access to the courts to persons whose claim to a benefit from proposed litigation is speculative. See also, *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 48 L.Ed.2d 450 (1976). Judge Meskill maintains in his dissent that the potential impact of the 1974 Law is questionable. He argues that HUD's failure to ensure that the appellant towns complete the expected to reside tables in their applications for Title I funds "did not make the plaintiffs' situation worse, but merely left it the same. The 'waiver' of the requirement by HUD did not have a negative effect. It merely failed to produce the hoped-for positive effect" (Slip Op. 1113). Accordingly, the appellees' claimed in-

jury is not based on a present injury but on a denial of "prospective benefit."

Under the above standard, an aggrieved low income person would not have standing to ensure administrative implementation of a congressionally created remedy, unless it were certain that judicial intervention would relieve his or her plight. Thus, Judge Meskill questions Congress' judgment in enacting the HAP procedures. "It is naive to imagine that plaintiffs' lot will be perceptibly improved merely by coercing the defendant towns into including accurate 'expected to reside' figures in their Block Grant applications. The 'expected to reside' figure lacks the magical power that would be required to produce such a result" (Slip Op. 1114). And:

> It is true, of course, that Congress expects, or at least hopes, that the "expected to reside" figure will have some impact. However, legislative expectations are not necessarily dispositive in determining whether those expectations are speculative. Slip Op. 1114, n. 5

Appellees submit that such inquiry into the effectiveness of a congressional remedy, especially in the context of the detailed goals and requirements set forth in the 1974 legislation, could well constitute the fulfillment of the silent Executive veto against which Judge Gurfein warned in his dissent in the *Evans* case.

> There is a need for judicial action where Congress has mandated benefits for a class and where an agency of the Executive Branch fails to carry out that legislative mandate. The contrary would give the Executive a silent veto not provided in the Constitution. 537 F.2d at 611.

Appellees do not believe it is the intent of either the *Evans* or *Warth* rulings to immunize an agency's disregard for the law. The Supreme Court in *Warth* in fact was

careful to note that it did not intend to impinge upon Congress' prerogatives. Justice Powell stated in *Warth* that, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of the statute." 422 U.S. at 513-514. See also, *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n. 3 (1973); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1973). Thus, the Supreme Court has instructed that the deprivation of the right to the legislative remedy itself constitutes injury in fact. The *Warth* court dealt only with an alleged violation of the Equal Protection Clause of the Fourteenth Amendment, ruling the complaint failed to assert "any right of action under the 1968 Civil Rights Act, nor can the complaint fairly be read to make out any such claim." 422 U.S. at 513.

Furthermore, it is clear that the Supreme Court, notwithstanding the imposition of additional barriers to establishing standing, adheres to the view that, "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of 'aggrieved persons' is symptomatic of that trend." *Association of Data Processing, Inc.* v. *Camp*, 397 U.S. 150, 154 (1970). See also, *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra; Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 U.S.L.W. 4073 (January 11, 1977).

In *Evans*, this Court did deal with an alleged violation of a statutory provision—the affirmative action requirement of the Fair Housing Law. There simply is no comparison, however, between the statutory remedy considered in *Evans* and that presented by the 1974 Act. The affirmative action requirement of the Fair Housing Law is an open-ended directive to administrative agencies to promote the general goal of equal housing opportunity. No detail

is provided as to how HUD should administer its programs to comply with the affirmative action requirement. The plaintiffs in *Evans* were, therefore, in the position of pressing their view of what constituted the minimum actions required of HUD and the Department of the Interior to comply with the generalized goal of affirmative action.*

There is no similar lack of precision concerning the congressional intent in the instant case. Appellees here do not propose to advise HUD of actions it should take to create a meaningful remedy; they seek only administrative compliance with clearly articulated statutory directives. Appellees seek only to ensure enforcement of policies already legislatively mandated.

There are additional compelling factors which distinguish *Evans* from the instant case. *Evans* clearly did not deal with the standing of a city to challenge federal grants. In fact, the district court in *Evans* (376 F.Supp. 327, 333 (S.D.N.Y. 1974)) indicated that a municipality perhaps would have standing to challenge a grant to a neighboring jurisdiction, raising the same issues involved in the *Evans* case. Also, Chief Judge Kaufman noted in his dissent in *Evans* that even under the majority decision in that case, "an inner city near a town receiving a HUD grant may

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* The plaintiffs in *Simon* v. *Eastern Kentucky Welfare Rights Org., supra,* were confronted with a similar lack of specificity in terms of legislative directives. In *Simon,* the Supreme Court held that several indigent persons lacked standing to challenge a change in an Internal Revenue Service ruling. The revised ruling permitted non-profit hospitals to retain tax-exempt status while permitting only emergency room service to indigents. The plaintiffs in *Simon* contended that non-profit hospitals should be required to provide in-hospital care as a condition for retaining tax-exempt status as a charitable institution. The *Simon* plaintiffs, like the *Evans* plaintiffs, found themselves in the posture of arguing what they thought was required of an administrative agency in terms of compliance with a generalized congressional purpose. The Supreme Court noted that the Internal Revenue Code did not define the term charitable and "the status of each non-profit hospital is determined on a case-by-case basis by the IRS." 48 L.Ed. 2d at 455.

have standing to challenge the grant. Indeed, a town which unsuccessfully applied for a grant might, by analogy with those cases granting competitor standing, be allowed to sue." 537 F.2d at 611, n. 10.

Both majority opinions in *Evans* stated a concern that the plaintiff class would not benefit from the injunctive relief requested. Thus, Judge Mansfield, in his concurrence in *Evans,* questioned whether the challenged monies would be available to assist the *Evans* plaintiffs as HUD would in all likelihood be free to reallocate the money perhaps to aid construction of sewer and recreation projects as far away as San Francisco. 537 F.2d at 598. Similarly, Judge Moore, pointed out that under the plaintiffs' claim, "had the grants not been approved, the monies *could conceivably* have gone to some other, as yet *totally imaginary* project in the County which *might* have had the result of making more housing available to them." 537 F.2d at 595 (emphasis in original).

By contrast, appellees have shown how the monies in question if reallocated must on a priority basis stay within the Hartford metropolitan area. Further, appellees seek enforcement of a legislative scheme designed to promote actual construction of lower cost housing on a deconcentrated basis for those now trapped in poor housing in inner cities. Thus by virtue of the HAP procedure, Title I grant recipients must provide commitments and undertake planning for construction of low cost housing. In completing the HAP expected to reside table, a city or town must recognize that a portion of its housing need relates to the needs and aspirations of persons not currently living in that community and the HAP must set goals to meet that need. The applicant is then required to specify areas in its community where low cost housing units will be built, HUD regulations providing that a HAP must indicate:

> the general locations, by census track (or enumeration districts in those jurisdictions where a census

> track includes a substantial area, such as an entire community) of proposed new housing construction units or projects and substantial rehabilitation units or projects for lower-income persons on maps as called for in paragraph (b)(2) of this section . . . 24 C.F.R. 570.303(c)(4).

Since the HAP is project oriented the low income appellees' claim to standing in the instant case is more similar to that of the low income minority plaintiff in *Arlington Heights* v. *Metropolitan Housing Corp.*, 45 U.S.L.W. 4073 (January 11, 1977), who was found to have standing, than to the low income plaintiffs in the *Warth* case. In *Warth,* the Supreme Court was troubled by the speculative aspects of the remedies sought in that the plaintiffs could not be assured that a declaration that Penfield, New York's zoning laws were unconstitutional would lead to the construction of low cost housing. The *Warth* plaintiffs did not include an entity capable of actually following through with development of low cost projects and were, therefore, dependent upon the actions of third parties not before the court. In *Arlington Heights,* the plaintiff also could not show with absolute certainty that the project in question would be built as the developer might at some point, even after obtaining necessary rezoning, be unable to proceed with the actual development of the housing. However, potential for construction was the critical distinguishing factor.

Obviously, there is a degree of speculation as to whether specifying locations and projects in a suburban community's HAP will lead to actual construction of those projects. However, the involvement of the municipality itself in the process, by designating locations where the community will sanction and promote low cost housing, substantially alters the equation and distinguishes the facts here from those in *Warth.* The legislative design of the

1974 Act clearly establishes a remedial framework sufficient to overcome the *Warth* and *Evans* problems.

The appellants are thus in error when they argue, as they have in their most recent brief, that *Evans* must be reversed for the appellees to be found to have standing in the instant case. Rather, a reversal of the district court decision would represent a significant departure from *Evans* and would involve the imposition of an extraordinary new barrier to the right to challenge agency noncompliance with federal laws.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the appellees' first brief, the decision of the district court should be affirmed in all respects.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 76, 198-99—September Term, 1976.

(Argued September 16, 1976 Decided December 23, 1976.)

Docket Nos. 76-6049, -6050, -6059

CITY OF HARTFORD, MIRIAM JORDAN, and FANNIE MAULDIN,

Plaintiffs-Appellees,

v.

TOWNS OF GLASTONBURY, WEST HARTFORD, and EAST HARTFORD,

Defendants-Appellants.

Before:

SMITH, OAKES and MESKILL,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Judge,* enjoining appellants from drawing upon or spending community development grant funds awarded under the Housing and Community Development Act of 1974, on the ground that the Department of Housing and Urban Development had unlawfully approved grant applications lacking valid estimates of the number of lower income persons "expected to reside" in the community, 42 U.S.C. § 5304(a)(4)(A) (Supp. V 1975).

Affirmed.

RALPH G. ELLIOT, Hartford, Conn., *for Appellant Town of Glastonbury.*

JOHN J. LANGENBACH, West Hartford, Conn., *for Appellant Town of West Hartford.*

JAMES A. WADE, Hartford, Conn., *for Appellant Town of East Hartford.*

RICHARD F. BELLMAN, New York, N.Y. (Mary R. Hennessey) and Barry S. Zitser, Hartford, Conn., of counsel), *for Appellees.*

ANTHONY J. STEINMEYER, Attorney, Department of Justice, and Robert P. vom Eigen, Attorney, Department of Housing and Urban Development (Rex E. Lee, Assistant Attorney General, Peter C. Dorsey, United States Attorney, Morton Hollander, Attorney, Department of Justice, Arthur J. Gang, Attorney, Department of Housing and Urban Development, of counsel), *for Secretary of Housing and Urban Development as Amicus Curiae.*

OAKES, *Circuit Judge:*

The history of federal aid to the beleagured cities of the United States has seen a transition from urban renewal to the Model Cities Program, which expanded categorical grants for urban needs, to general revenue sharing in the 1970s, with accompanying block grants in general functional areas, such as manpower training, education and law enforcement. One of the more recent block grant programs is that for "community developments grants," authorized

by the Housing and Community Development Act of 1974, § 103, 42 U.S.C. § 5303 (Supp. V 1975). This appeal, apparently the first of its kind to be decided under the 1974 Act,[1] requires us to decide whether the Department of Housing and Urban Development (HUD) improperly approved certain applications for community development grants.

The City of Hartford, Connecticut, and two of its low-income residents have sued to enjoin seven suburban communities from receiving or expending grants approved by HUD under the Act, principally on the ground that the grant applications either contained no estimate, or an arbitrary, wholly inaccurate estimate, of the number of lower income persons "expected to reside" within the community, an apparent violation of 42 U.S.C. § 5304(a)(4)(A) (Supp. V 1975). A permanent injunction was entered by the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, Judge. *City of Hartford* v. *Hills*, 408 F. Supp. 889 (D. Conn. 1976). The towns of Glastonbury, West Hartford and East Hartford appeal; HUD does not appeal, nor do the other towns that were originally defendants and have been enjoined by the order below. We affirm.

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1 *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480 (U.S. Apr. 20, 1976), was an attack upon HUD housing policies generally, and the remedial order under review was issued in 1969, long before passage of the Housing and Community Development Act. The *Gautreaux* Court did refer to the 1974 Act, however, *id.* at 4486-87 & n.21, including quotation of the Title I objective of "promoting greater choice of housing opportunities and avoiding undue concentration of assisted persons," 42 U.S.C. § 5304(a)(4)(C)(ii), and citation of the district court's opinion in the instant case. 44 U.S.L.W. at 4487 n.21.

There is a district court decision dealing with alleged deficiencies in a grant application submitted under Title I of the Act, the court holding that the plaintiffs had produced insufficient evidence that the application had been improperly approved. *Ulster County Community Action Comm., Inc.* v. *Koenig*, 402 F. Supp. 986, 990 (S.D.N.Y. 1975).

I. Facts

A. *The Structure of the Act*

Title I of the Housing and Community Development Act of 1974 established a new system of federal assistance for community development activities, to be administered by HUD, and consolidated and superseded previous categorical programs,[2] each of which had specified purposes and particular statutory and administrative restrictions. Title I, in short, was intended to create a streamlined program dealing comprehensively with urban problems previously addressed in a piecemeal fashion. *See* S. Rep. No. 93-693, 93d Cong., 2d Sess. 1-2, 48-49, *reprinted in* [1974] U. S. Code Cong. & Ad. News 4273, 4273-74, 4318-19; H.R. Rep. No. 93-1114, 93d Cong., 2d Sess. 2-3 (1974). The community development grants authorized by the Act may be used by localities in a variety of ways related to improvement of the physical and economic environment, such as for the acquisition of blighted land and historic sites, the construction or improvement of street lights and playgrounds, the enforcement of housing codes in deteriorating areas, and the development of community and management planning capabilities. 42 U.S.C. § 5305 (Supp. V 1975); *see* 24 C.F.R. § 570.200(a) (1976). The Title I funds may not be used, however, for the construction of housing or the payment of housing allowances, with minor exceptions not relevant here, *id.* § 570.201(f), (g).[3] These matters are

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2 The programs consolidated included ones for urban renewal, Model Cities, water and sewer facilities, and open-space land. *See* 42 U.S.C. § 5316; *City of Hartford* v. *Hills*, 408 F. Supp. 889, 897 n.27 (D. Conn. 1976).

3 The exceptions relate to use of funds for so-called "last resort housing," *see* 24 C.F.R. § 43.1 *et seq.* (1976), and for relocation assistance payments for persons displaced by activities funded by grant monies, *see id.* § 570.200(a)(11).

covered elsewhere in the Act, particularly in Title II, codified at 42 U.S.C. § 1437 *et seq.* (Supp. V 1975).

In terms of administrative review, Title I represents a compromise between the Administration's revenue sharing approach, under which communities would have automatically received funds on the basis of objective needs criteria, without any application or review process, and the approach favored by some members of Congress, which would have imposed substantial federal preconditions to grant awards and established elaborate application and review procedures. *See generally* Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development,* 7 Urban Law. 189, 191-200 (1975). The Act requires that communities apply to HUD, 42 U.S.C. § 5304(a) (Supp. V 1975), but limits HUD's review power in several ways. Cities and counties are declared "entitled" to the grant funds, *id.* § 5306(a), and an application is deemed approved 75 days after receipt by HUD unless the Secretary gives the applicant "specific reasons for disapproval," *id.* § 5304(f). The Secretary must approve an application, moreover, unless she determines, *inter alia,* that the applicant's description of community "needs and objectives is plainly inconsistent with [generally available] facts or data," *id.* § 5304(c).[4]

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4 42 U.S.C. § 5304(c) (Supp. V 1975) provides in full:

> The Secretary shall approve an application for an amount which does not exceed the amount determined in accordance with section 5306(a) of this title unless—
>
> (1) on the basis of significant facts and data, generally available and pertaining to community and housing needs and objectives, the Secretary determines that the applicant's description of such needs and objectives is plainly inconsistent with such facts or data; or
>
> (2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting

Finally, with regard to requirements that an applicant comply with certain civil rights laws and provide for citizen participation in the grant planning process, the Secretary may rely upon the "satisfactory assurances" of the applicant, rather than make an independent investigation. *Id.* § 5304(a)(5), (6).

While community development grants may not be used for housing, Title I was designed in part to "[foster] the undertaking of housing and community development activities in a coordinated and mutually supportive manner." *Id.* § 5301(d)(4). Moreover, specific objectives of the Title include provision of "a decent home," especially for those with low and moderate incomes, *id.* § 5301(c)(3), and "the spatial deconcentration of housing opportunities for persons of lower income," *id.* § 5301(c)(6).[5] In accordance

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the needs and objectives identified by the applicant pursuant to subsection (a) of this section; or

(3) the Secretary determines that the application does not comply with the requirements of this chapter or other applicable law or proposes activities which are ineligible under this chapter.

5 42 U.S.C. § 5301(c) (Supp. V 1975) provides in full:

The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives—

(1) the elimination of slums and blight and the prevention of blighting influences and the deterioration of property and neighborhood and community facilities of importance to the welfare of the community, principally persons of low and moderate income;

(2) the elimination of conditions which are detrimental to health, safety, and public welfare, through code enforcement, demolition, interim rehabilitation assistance, and related activities;

(3) the conservation and expansion of the Nation's housing stock in order to provide a decent home and a suitable living environment for all persons, but principally those of low and moderate income;

with these goals, the grant application submitted to HUD must include a "housing assistance plan" (HAP) that "accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower-income persons . . . residing in or expected to reside in the community . . . ," *id.* § 5304(a)(4)(A), with "a realistic annual goal" specified for housing assistance, *id.* § 5304(a)(4)(B).[6] The housing needs detailed in the HAP

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(4) the expansion and improvement of the quantity and quality of community services, principally for persons of low and moderate income, which are essential for sound community development and for the development of viable urban communities;

(5) a more rational utilization of land and other natural resources and the better arrangement of residential, commercial, industrial, recreational, and other needed activity centers;

(6) the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income; and

(7) the restoration and preservation of properties of special value for historic, architectural, or esthetic reasons.

It is the intent of Congress that the Federal assistance made available under this chapter not be utilized to reduce substantially the amount of local financial support for community development activities below the level of such support prior to the availability of such assistance.

6 42 U.S.C. § 5304(a)(4) (Supp. V 1975) provides in full (emphasis added):

No grant may be made pursuant to section 5306 of this title unless an application shall have been submitted to the Secretary in which the applicant—

. . .

(4) submits a housing assistance plan which—

(A) accurately surveys the condition of the housing stock in the community and *assesses the housing assistance needs of lower-income persons* (including elderly and handicapped persons, large families, and persons displaced or to be displaced) *residing in or expected to reside in the community,*

(B) specifies a realistic annual goal for the number of dwelling units or persons to be assisted, including (i) the relative proportion

can then be met with funds available under Title II of the Act. Thus (and this is crucial to the case) the HAP serves as the vehicle tying together the community development and housing assistance portions of the Act, in furtherance of the Act's overall goal of coordination of federal urban efforts, *see id.* § 5301(d). The critical importance of the HAP in the overall scheme of the 1974 Act is underscored in the Act itself[7] and in the legislative history;[8] it has been

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of new, rehabilitated, and existing dwelling units, and (ii) the sizes and types of housing projects and assistance *best suited to the needs of lower-income persons in the community*, and

(C) indicates the general locations of *proposed housing for lower-income persons*, with the objective of (i) furthering the revitalization of the community, including the restoration and rehabilitation of stable neighborhoods to the maximum extent possible, (ii) promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons, and (iii) assuring the availability of public facilities and services adequate to serve proposed housing projects[.]

7 42 U.S.C. § 5304(b)(3) and (4) (Supp. V 1975) together allow the Secretary of HUD, under certain conditions, to waive or otherwise dispense with all of the application requirements in subsection (a) *except* the housing assistance plan requirement. The district court observed that this exclusion showed "the pivotal role [Congress] intended for the HAP." 408 F. Supp. at 898; *see id.* at 901.

8 The House Report states:

> This [housing assistance plan] requirement, together with provisions in title II of the bill which allocate housing assistance funds to communities based, in part, on the housing needs specified in these plans, will make it possible for communities to plan unified community development and housing programs. For the first time, after nearly three decades, of Federal aid for housing and community development, communities will be able to coordinate the location of new housing units with existing or planned public facilities and services, such as schools, transportation, police and fire protection, recreational facilities, and job opportunities. The committee bill will put an end to a system of support for community development and housing activities which recognizes their close relationship but fails to provide the mechanisms necessary to permit them to be undertaken on a unified basis.

H.R. Rep. No. 93-1114, 93d Cong., 2d Sess. 3 (1974).

recognized by HUD[9] and was fully appreciated by the court below.[10]

B. *Appellants' Grant Applications*

The three suburban towns here involved submitted applications for community development grants to HUD in the spring of 1975, after having first sent the applications "for review and comment" to the Hartford region's areawide planning agency, the Capital Region Council of Governments (CRCOG), pursuant to 42 U.S.C. § 5304(e) (Supp. V 1975). The CRCOG received adverse comments on the HAP and other aspects of the applications from the City of Hartford and a Hartford civil rights group, and it forwarded these comments to HUD. The HUD regional director in Boston, in a late April memorandum to the director of HUD's Hartford office, found the City's comments in particular to be "well documented and of a very serious nature." In addition, the area director of HUD's Equal Opportunity Division recommended disapproval of all three applications.

While the Hartford office was in the process of reviewing the applications in light of these criticisms, it received a May, 1975, memorandum from HUD's Assistant Secretary for Community Planning and Development. That memorandum recognized that both grant applicants and HUD were having difficulty estimating the number of low-income persons "expected to reside in the community," an estimate

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9 The "Notice of Proposed Rulemaking" that introduced part of the proposed HUD Title I regulations termed the HAP "one of the most significant parts of the community development application process" and mentioned its "significant impact on various aspects of HUD-assisted housing program activities." 41 Fed. Reg. 2348 (1976).

10 408 F. Supp. at 898.

central to the HAP, *see* note 6 *supra*, and suggested possible sources of data from which HUD might develop its own figures. It also gave applicants an option that eventually led to this case: instead of developing its own "expected to reside" figure or accepting HUD's, a locality could obtain approval of its application simply by "indicat[ing]" the steps it would take to "identify a more appropriate needs figure by the time of its second year submission." The memorandum was quite explicit as to the meaning of this option: HUD would not require the adoption of *any* "expected to reside" figure on first year grant applications such as those in issue here.

Appellants West Hartford and Glastonbury, along with several other towns, accepted the option offered by HUD and thus submitted zero figures for the "expected to reside" portion of the HAPs in the final applications approved by HUD.[11] The two towns were granted $999,000 and $910,000 respectively. East Hartford's application had been approved prior to receipt of HUD's May memorandum, and it contained an "expected to reside" figure of 131, derived exclusively from the waiting list of the town's public housing authority. East Hartford was granted $440,000.

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11 Appellants have raised the fact that Hartford itself, in applying for community development funds (which it received), also submitted a zero "expected to reside" figure in its HAP. Since Hartford's application was never challenged on this ground, however, its "expected to reside" figure is irrelevant to the claim against appellants. There was testimony before the district court, moreover, indicating that Hartford's zero figure was not necessarily a result of HUD's May memorandum, but was rather based upon consideration of current and projected population trends. Hartford's Director of Planning stated that Hartford's population was declining, so that, while its application listed a large number of low-income persons residing in the city, it was expected that any new low-income residents would be offset numerically by others leaving Hartford for the suburbs, where the population was increasing. He thus concluded that Hartford's zero figure for new low-income residents was both "fair" and "realistic."

II. Standing

Appellants challenge the standing of both the City of Hartford and the low-income plaintiffs to seek the injunction granted by the court below. The district court concluded that both had standing, 408 F. Supp. at 893-97, but it lacked the benefit of our en banc decision in *Evans* v. *Lynn*, 537 F.2d 571, 589 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3346 (U.S. Oct. 29, 1976), which is primarily relevant to the claim of the low-income plaintiffs.[12] We find *Evans* to be distinguishable from the instant case and affirm the district court's decision upholding the standing of all appellees.

A. *The City of Hartford*

The standing of the City here is dependent upon a showing both that the City has been injured "in fact" by HUD's approval of the challenged grants and that the interest the City seeks to protect is one "arguably within the zone of interests to be protected . . . by the statute." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152-53 (1970); *see Evans* v. *Lynn*, *supra*, 537 F.2d at 592. Since the injury in fact test must be met at the threshold, 537 F.2d at 592; *see* K. Davis, *Administrative Law of the Seventies*, § 22.02-1, at 487 (1976), we turn first to its application to the City.

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12 The *Evans* plaintiffs were low-income persons, and thus, in view of the importance of a case's particular facts in resolving standing issues, *see The Supreme Court, 1974 Term*, 89 Harv. L. Rev. 47, 189 & n.7 (1975), *Evans* has little direct relevance to the question of the City's standing. The district court in *Evans*, in denying standing, expressly stated that a city "would be in a peculiarly appropriate position" for standing in a case of this sort, *Evans* v. *Lynn*, 376 F. Supp. 327, 333 (S.D.N.Y. 1974) (dictum), *aff'd*, 537 F.2d 571, 589 (2d Cir. 1976) (en banc), a proposition with which Chief Judge Kaufman has concurred, 537 F.2d at 611 n.10 (dissenting opinion). Of course, as the following discussion makes evident, *Evans* does provide some general guideposts for our decision with regard to the City's standing.

The district court found that Hartford had been injured by HUD's approval of the grants because, if the grants had been disapproved, the amounts allocated for them would have been reallocated, pursuant to 42 U.S.C. § 5306(e) (Supp. V 1975), to other Connecticut "metropolitan areas" (defined in *id.* § 5302(a)(3) to mean "standard metropolitan statistical areas [SMSAs] as established by the Office of Management and Budget"), among which Hartford would have had a priority position. 408 F. Supp. at 894-95. Appellants argue that, under the statute as modified by HUD regulations, 24 C.F.R. § 570.409(f)(1) (1976), Hartford's position is no better than that of all other towns—we would add, except those with disapproved applications—in the Hartford SMSA. But this demonstrates at most that Hartford's financial stake may not be as large as the sum of all the grants involved in this litigation; it is a long way from proving that Hartford lacks a stake altogether. *See Warth* v. *Seldin,* 422 U.S. 490, 501 (1975) (plaintiff showing "distinct and palpable injury to himself" has standing, even if large group shares the injury); K. Davis, *supra,* § 22.02-10, at 507 ("The line is not between a substantial injury and an insubstantial injury. The line is between injury and no injury."). Appellant's argument, moreover, does not recognize that HUD is unlikely to reallocate funds to localities that did not apply originally for community development funds in 1975; with these localities and the seven towns enjoined below eliminated from the reallocation pool, only Hartford and two other towns in the SMSA would remain eligible.

Appellants further argue that reallocation funds will be distributed only to applicants with "urgent needs," citing 24 C.F.R. § 570.401(b) (1976) (defining "urgent needs") and *id.* § 570.409(d), (f) (establishing criteria and priori-

ties for reallocation), and that Hartford has shown no such needs. There is no indication, however, that Hartford —a city with a high concentration of lower income and unemployed persons and welfare recipients, *see* 408 F. Supp. at 893-94 n.14, and thus likely to have some of the financial resources problems to which the "urgent needs" definition is addressed, *see* 24 C.F.R. § 570.401(b) (1976)—will not be able to make the requisite showing when it applies to HUD for reallocation funds, as it has indicated its intention to do, *see City of Hartford* v. *Hills*, 408 F. Supp. 879, 885-86 (D. Conn. 1975) (decision granting preliminary injunction). Appellants' argument essentially would require a city to present its reallocation application to the district court, rather than to HUD, before the court makes the decision that releases funds to be reallocated. Such a requirement would be at least wasteful of resources, since the court could decide that HUD had correctly approved challenged grants, and in any event would require a city to make a far more detailed showing of injury than any previous case has required, *see Warth* v. *Seldin, supra*, 422 U.S. at 504 (plaintiffs need only "allege" facts from which it can "reasonably . . . be inferred that . . . there is a substantial probability" of injury). The strong likelihood that Hartford will receive reallocated funds, while not an absolute certainty, is therefore sufficient to establish that Hartford will "benefit in a tangible way from the courts' intervention." *Id.* at 508; *cf. Evans* v. *Lynn, supra*, 537 F.2d at 595 (no injury in fact shown when plaintiffs "claim[ed] only that, had the grants not been approved, the monies *could conceivably* have gone to some other, as yet *totally imaginary* project . . . which *might* have" benefited plaintiffs (emphasis in original)).

There is a second, less quantifiable way in which the City has been injured by HUD's approval of the grants. The

district court found that "[t]he housing situation in Hartford is bleak," referring especially to the high concentration of subsidized, low-rent housing in the City relative to the greater Hartford region and to the overcrowding caused by a housing shortage in the City. 408 F. Supp. at 893-94 n.14. The elimination or amelioration of precisely these sorts of problems is an explicit goal of the Act: 42 U.S.C. § 5301(c) (Supp. V 1975), quoted in full at note 5 *supra*, declares that the grants authorized are for the support of activities with such objectives as "the elimination of slums and blight" and "conditions . . . detrimental to health, safety, and public welfare," and, most importantly for present purposes,

> the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income . . . .

See also id. § 5301(a)(1) (declaration of Congress that urban problems arise from, *inter alia*, "the concentration of persons of lower income in central cities"). This spatial deconcentration objective, the district court found, cannot be met unless an estimate is made of the number of lower income persons "expected to reside" in the community. 408 F. Supp. at 901-02. The Act's legislative history also suggests a close relationship between spatial deconcentration and the "expected to reside" figure. *See* H.R. Rep. No. 93-1114, *supra*, at 3, 6-7. It follows that, when the Secretary approved applications without these estimates, she was substantially lessening the probability that the towns would use the funds received to promote spatial deconcentration and related objectives. Since Hartford would have been the direct beneficiary of spatial deconcentration ef-

forts by its suburbs—to take a concrete example, the City's welfare and housing subsidy outlays would be decreased if large numbers of lower income persons moved to the suburbs—the City was plainly injured by the Secretary's approval of grant applications lacking "expected to reside" figures.[13]

In addition to establishing injury in fact, we take it that Hartford must show that the interest it seeks to protect is "arguably within the zone of interests to be protected . . . by the statute." *Association of Data Processing Service Organizations* v. *Camp, supra,* 397 U.S. at 153.[14] The stat-

13 The City's claim of injury in this respect is quite different from the injury allegedly suffered by a city's taxpayers in *Warth* v. *Seldin,* 422 U.S. 490 (1975). The taxpayers asserted that the exclusionary zoning policies of a suburb forced the city to provide more public housing, which in turn increased the tax burden on the taxpayer plaintiffs. The *Warth* Court held they lacked standing on alternative grounds: first, because their injury resulted, not from the challenged zoning policies, but from decisions to build public housing on the part of city officials; and, second, even assuming injury, because plaintiffs were not asserting any personal right to be free of the suburb's adverse zoning policies, but were asserting rights of third parties. 422 U.S. at 508-10.

By contrast, Hartford's injury here stems from a decision, not by its own officials, but by the Secretary of HUD, an injury over which Hartford had no control. *Cf. The Supreme Court, 1974 Term, supra,* 89 Harv. L. Rev. at 192 (distinguishing injury in *Warth* from one resulting from "inexorable economic forces"). In view of the Act's spatial deconcentration objective, "the line of causation," 422 U.S. at 509, between the Secretary's decision and Hartford's injury is a direct one. Moreover, as discussed in the text *infra,* Hartford is asserting a right of its own, one falling within the zone of interests protected by the statute.

14 Professor Davis has cogently argued that the "zone of interests" test "is more verbiage than reality." K. Davis, *Administrative Law of the Seventies* § 22.00, at 486 (1976). He summarizes his reasons for this statement as follows:

> [T]he test is contrary to the APA, the Supreme Court itself has not followed it, the test seems unsatisfactory, only two cases have denied standing on the basis of the test to one who is injured in fact, and all federal courts have generally found ways to escape from applying it.

Id. § 22.02-11, at 515.

ute here, like the one in *Data Processing*, "do[es] not in terms protect a specified group. But [its] general policy is apparent . . . ." *Id.* at 157. The objectives quoted in the preceding paragraph indicate a concern about persons of low and moderate income, but, contrary to appellants' suggestion, these individuals as individuals are not the only concern of the Act. "The primary objective of [Title I] is the development of viable urban communities . . . ." 42 U.S.C. § 5301(c) (Supp. V 1975). In the list of the purposes for which grants are to be awarded, one finds repeated references to this theme, expressed in terms of "the welfare of the community," improvement of . . . community services," "sound community development," and "the revitalization of . . . neighborhoods." *Id.* § 5301(c)(1), (4), (6); *see* note 5 *supra*. As the legal entity responsible for representation of the community as a community, Hartford plainly has an interest that falls within the zone of interests protected by the Act. We agree with the district court's conclusion: "[T]here can be no doubt that the statute was intended to ameliorate the problems facing the City of Hartford." 408 F. Supp. at 894. Thus, contrary to appellants' suggestion, Hartford is not suing on behalf of its citizens as *parens patriae*, but is instead seeking to vindicate interests of its own, which also happen to be, to some extent, congruent with the interests of individual city residents. *See California v. Automobile Manufacturers Association (In re Multidistrict Vehicle Air Pollution M.D.L. No. 31)*, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

B. *The Low-Income Plaintiffs*

Like the City, the individual plaintiffs—low-income Hartford residents living in substandard housing, according to affidavits accepted by the district court, 408 F. Supp. at

895 & n.18—must meet both the injury in fact and zone of interests tests in order to have standing to sue. The latter test is easily met here, since the 1974 Act was intended, and the grant funds must be used, to benefit principally "persons of low and moderate income," a phrase repeated throughout 42 U.S.C. § 5301(c) (Supp. V 1975), *see* note 5 *supra*. Moreover, the specific statutory requirement at issue here, the HAP requirement, involves an assessment of, and planning for, "the needs of lower-income persons," both residing in and "expected to reside" in the locality. 42 U.S.C. § 5304(a)(4) (Supp. V 1975); *see* note 6 *supra*. *See also* 42 U.S.C. § 5304(b)(2) (Supp. V 1975) (grant applicant must certify that its program will "give maximum feasible priority to activities which will benefit low- or moderate-income families"). It seems clear that Title I's "zone of interests" encompasses the interests of low-income residents of a central city.

The more difficult issue is whether the individual plaintiffs have been injured in fact by the Secretary's approval of appellants' grant applications. The absence of such injury led to findings that low-income plaintiffs lacked standing in *Warth* v. *Seldin*, *supra*, and *Evans* v. *Lynn*, *supra*. Because the facts of both cases were quite different from the facts of the instant case, however, neither is controlling here. In *Warth* the low-income plaintiffs alleged that they had been excluded from a town's housing market by virtue of the town's "exclusionary" zoning ordinance, which they claimed was constitutionally defective. The Supreme Court ruled that the plaintiffs had failed to show that they "personally would benefit in a tangible way from the courts' intervention," 422 U.S. at 508, in large part because "their inability to reside in [the town] is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts," *id.* at 506. Plaintiffs

here are asserting a specific violation of a statute, not a generalized claim that a law is unconstitutional, a factor of substantial importance in view of the *Warth* Court's recognition that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing . . . .'" *Id.* at 500, *quoting Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973). As discussed above, the statute at issue here was designed to protect persons in the plaintiffs' situation, and the approval of applications lacking legitimate "expected to reside" figures in the HAPs appears to have directly injured the plaintiffs, since the HAPs were intended to lead to greater low-income housing opportunities on a deconcentrated, regional basis, *see Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4486-87 n.21 (U.S. Apr. 20, 1976). The district court's intervention, moreover, should be of tangible benefit to the plaintiffs, because it is likely to lead to a reallocation of funds to Hartford, *see supra*, which will be required to use the funds for the benefit of persons of low and moderate income, in accordance with the purposes of the Act.

Evans v. *Lynn* is also distinguishable. Although the case has some superficial similarity to the instant case, in that it was an attempt to enjoin HUD's award of federal grant funds on statutory grounds, the en banc majority held that the plaintiffs there failed to demonstrate that they had been injured by the grant awards or that court intervention would be of benefit to them. *See* 537 F.2d at 595. Beyond that, as Judge Mansfield pointed out in his concurring opinion, if the awards to the New York town in *Evans* had been enjoined, "HUD would presumably [have been] free to use the money to aid construction of sewers and parks in San Francisco." *Id.* at 598. HUD does not have any such freedom in the instant case; the statute gives reallo-

cation priority to "metropolitan area[s] in the same state," 42 U.S.C. § 5306(e) (Supp. V 1975), and HUD's own regulations give priority "to the same metropolitan area," 24 C.F.R. § 570.409(f)(1)(i) (1976). While "[t]he most" the *Evans* plaintiffs could expect was "the satisfaction that federal funds will not be misused," 537 F.2d at 598 (Mansfield, *J.*, concurring), plaintiffs here can expect concrete benefits resulting from both reallocation of community development funds and increased attention to the low-income housing improvement and spatial deconcentration objectives of the Act.[15]

III. The Alleged Violations of the Act

In considering the substance of plaintiffs' allegations that the Housing and Community Development Act was violated by HUD's approval of the challenged grants, we will examine the claim as to East Hartford separately from that as to West Hartford and Glastonbury, because, as indicated *supra*, the latter two towns submitted "expected to

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15 The dissent, relying on *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973), downplays the congressional emphasis on the "expected to reside" portion of the statute, note 6 *supra*, which is a prerequisite to approval by HUD of a grant application. *See* note 5 of dissenting opinion. But *Linda R. S.* v. *Richard D.* arose "in the unique context of a challenge to a criminal statute," 410 U.S. at 617, and has no relevance to the bearing of "legislative expectations" on standing determinations. The *Linda R. S.* Court expressly distinguished the case before it from a case like the instant one, in which standing derives from the invasion of a statutorily-protected interest. *Id.* at 617 & n.3.

The dissent also refers to *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 44 U.S.L.W. 4724 (U.S. June 1, 1976), using it for the proposition that Hartford bears the burden of proof on the issue of standing. We think that burden met. *Simon is* further cited for the propositions that the injury must be traceable to the challenged actions of the defendants and that the court's remedy must serve to prevent the alleged harm. These accepted propositions can be applied, however, only in the context of the Act of Congress with which this case is concerned; in that context, as our opinion seeks to demonstrate, both requirements have been more than satisfied.

reside" figures of zero on their HAPs, whereas East Hartford submitted an actual number (131).

A. *West Hartford and Glastonbury*

In submitting grant applications with zero "expected to reside" figures, the two towns were following the option given to them by HUD in the May, 1975, memorandum. The district court held that this option constituted an invalid waiver of a crucial portion of the 1974 Act, so that the appellants in selecting the option, and HUD in approving the grants, all acted contrary to the Act. 408 F. Supp. at 902. HUD now appears to concur in this holding; its amicus brief explicitly declines even partially to contest the district court's conclusion in this regard and assures us that HUD has modified its regulations to bar zero figures submitted because of an alleged unavailability of data. Brief for Secretary of Housing and Urban Development as Amicus Curiae at 16-18.

We agree with the district court and with the HUD amicus brief. The Act itself could not be more clear: no grant may be made unless the applicant submits an application with six elements, one of which is the housing assistance plan, 42 U.S.C. § 5304(a) (Supp. V 1975); the plan must "accurately" assess the housing needs of low-income persons, "residing in or expected to reside in the community," *id.* § 5304(a)(4)(A). *See* note 6 *supra*. Were this the only statutory statement relating to the grant application, it would probably enable us to find that HUD's memorandum improperly authorized a waiver, for the simple reason that, absent some overriding exigency, an administrative agency may not waive an express statutory requirement. *Cf. Morton* v. *Ruiz*, 415 U.S. 199, 232 (1974) (agency's decisions must be consistent with governing legislation); *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965) (courts must prevent "the unauthorized

assumption by an agency of major policy decisions properly made by Congress"); *Marsano* v. *Laird*, 412 F.2d 65, 69 (2d Cir. 1969) ("an express statutory right cannot be impaired by administrative action").

The Act does give further guidance, however. In the subsection following the application requirements, it allows the Secretary, in certain circumstances, to waive, or accept the applicant's certification as to, five of the six requirements. 42 U.S.C. § 5304(b)(3), (4) (Supp. V 1975). The only requirement not listed is that for the HAP. The conclusion is virtually inescapable that the Secretary lacked discretion to waive the HAP requirement. *See* 408 F. Supp. at 901; text at and notes 7-10 *supra*.

It is true that, as appellants argue, waiver of submission of the "expected to reside" figure is not waiver of the entire HAP requirement. A reading of the whole statute, however, makes it evident that the HAP's value is substantially undermined by omission of this figure. If an applicant makes no effort to predict the number of lower income persons it expects to reside within its boundaries in the near future, it is difficult to see how the applicant can "specif[y] a realistic annual goal" for assisted housing or indicate with any reliability where the proposed housing will be located, both of which it must do in order to complete the HAP. 42 U.S.C. § 5304(a)(4)(B), (C) (Supp. V 1975); *see* note 6 *supra*. In the legislative history of the Act, Congress "emphasize[d]" the importance of communities, "in assessing their housing needs, look[ing] beyond the needs of their residents to those who can be expected to reside in the community as well." H.R. Rep. No. 93-1114, *supra*, at 7. *See also* 408 F. Supp. at 901 ("the 'expected to reside' figure is the keystone to the *spatial deconcentration objective* of the 1974 Act" (emphasis in original)). Because of the central role of the "expected to reside"

estimate, we think eminently sound Judge Blumenfeld's conclusion that a waiver of this requirement is in effect a waiver of the entire HAP. *See id.* at 901-02.

Appellants argue in the alternative that the zero figures can be considered legitimate, because the data necessary to make accurate "expected to reside" estimates was not available. The Secretary was thus forced by practical exigencies, they contend, to "defer" this requirement. We believe this argument entirely misunderstands the meaning of a statutory directive. When Congress directs that something be done, it should be done, even if the data base is far from perfect. *Cf. Adams* v. *Richardson*, 480 F.2d 1159, 1164 (D.C. Cir. 1973) (en banc) (per curiam) (lack of agency experience in area does not "justif[y] a failure to comply with a Congressional mandate"); *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584, 592-95 (D.C. Cir. 1971) (agency must take action even if not convinced "beyond a doubt" as to proper course); L. Tribe, *Channeling Technology Through Law* 33 (1973) (technology assessment frequently amounts to nothing more than "reconciling highly imprecise professional hunches"). Congress was presumably aware of the data collection problems localities might face, *see* H.R. Rep. No. 93-1114, *supra*, at 7, but it apparently preferred an administrative decision based on incomplete data to no decision at all. It is clear that a substantial amount of data was available to the towns; the very HUD memorandum that gave them the zero figure option also listed a variety of data sources from which a reasonable figure could be calculated. Educated guesses by the towns as to how many low-income persons might be expected to reside therein would surely have been better than the sham zero figures in promoting the rational community planning with which Congress was concerned.

B. *East Hartford*

The Town of East Hartford did submit an "expected to reside" figure, but the district court concluded that HUD's review of this figure's validity was so seriously inadequate as to constitute an abuse of discretion. The figure submitted was based upon a projection of the waiting list of the East Hartford Housing Authority, and HUD failed to verify in any way whether this figure was a valid one. While HUD sought to justify this failure by asserting an absence of data, HUD's own regulations, application instructions, and memoranda suggested sources of data that were "generally available," 42 U.S.C. § 5304(c)(1) (Supp. V 1975), and that should have been used by HUD to verify the accuracy of East Hartford's figure. Thus, the district court concluded, "HUD was doubly at fault—it did not obtain the generally available information required for a proper review, and it acted upon the basis of inadequate information." 408 F. Supp. at 903.

As the district court recognized, *id.* at 903 & n.57, the general proposition that review of agency discretion is narrowly circumscribed, *see Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971), is particularly compelling in the case of review of approval of community development grants, since the statute's application and approval procedures, as discussed *supra*, establish a "presumption of approval." *See also Ulster County Community Action Committee, Inc.* v. *Koenig*, 402 F. Supp. 986, 990 (S.D.N.Y. 1975); Fishman, *supra*, 7 Urban Law. at 211. As the Supreme Court stated in *Overton Park*, however, such a presumption does not "shield [the Secretary's] action from a thorough, probing, in-depth review." 401 U.S. at 415; *see Schicke* v. *Romney*, 474 F.2d 309, 315 (2d Cir. 1973). This court has plainly held, moreover, that "it is 'arbitrary or capricious' for an agency not to take into

account all relevant factors in making its determination." *Hanly* v. *Mitchell*, 460 F.2d 640, 648 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972). At the very least, "ascertainable standards" are required. *Holmes* v. *New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968).

East Hartford argues on appeal that its "expected to reside" figure of 131 was not proven wrong by the district court. This argument misunderstands the role of the courts in reviewing agency action. The district court did not have an obligation, and perhaps lacked the authority, to assess the correctness of East Hartford's figure. Its role was both more limited and more vital to the proper functioning of the administrative process: to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 416.

It seems clear that HUD made a major "error of judgment" in not independently investigating East Hartford's figure. A suburban town's attempt to ascertain the housing needs of future residents from a waiting list for a limited supply of public housing units is certainly sufficiently questionable to require some further verification. The court below found that data was "generally available" from which such a verification could have been made. Essentially for the reasons stated by the district court, 408 F. Supp. at 902-07, we conclude that the Secretary acted arbitrarily and capriciously in approving East Hartford's grant application.[16]

16 We recognize and appreciate Professor Davis's concern that review on the basis of "whether there has been a clear error of judgment," *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971), comes too close to judicial substitution of judgment. K. Davis, *supra* note 14, §§ 29.00, 29.01-5. It is equivalent, Professor Davis urges, to the "clearly erroneous" test, which in turn involves broader review than even the "substantial evidence" test, *id.* § 29.01-5, at 666, which

IV. The Remedy

The injunction issued by the district court is challenged on the ground that it was directed against appellant towns, rather than against HUD. In view of the fact that HUD had sent letters of credit to the towns by the time the preliminary injunction was issued, so that they were free to obtain grant funds from the Treasury, *see City of Hartford* v. *Hills, supra,* 408 F. Supp. at 882 (opinion on motion for preliminary injunction), the court's order restraining the towns (who were defendants) from drawing out or spending these funds appears to be the most direct means of preventing expenditure of unlawfully authorized monies. The injunction provided, moreover, that it could "be lifted upon the filing with the court of . . . a new approval [of the towns' grant applications]." 408 F. Supp. at 907. Such an injunction, combining a practical means to a desired end with a mechanism to take account of future developments, is consistent with the broad, flexible nature of the federal courts' equitable powers. *See Hills* v. *Gautreaux, supra,* 44 U.S.L.W. at 4484, and authorities cited therein.

The suggestion is made that the case may be moot as to West Hartford and Glastonbury because they have filed new applications, the 75-day period has run, and they are entitled to funds under the new applications. *See* 42 U.S.C. § 5304(f) (Supp. V 1975). But the injunction relates only to funds granted prior to the time of its entry and is

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similarly affords "a considerably more generous judicial review than the 'arbitrary and capricious' test available in the traditional injunctive suit," *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 143 (1967). But it is no substitution of judgment to say that approval of a block grant under the Act must depend upon agency consideration of *all* the data that the agency itself thinks relevant to the statutory requirement of an "expected to reside" estimate. *See* K. Davis, *supra* § 29.01-5, at 666 (approving *Overton Park's* "consideration of relevant factors" test).

not mooted by any later grants pursuant to later submissions. The injunction may be lifted by filing with the district court new HUD approvals of applications with adequate "expected to reside" figures.

Judgment affirmed.

MESKILL, *Circuit Judge* (dissenting):

I respectfully dissent, for I cannot agree that the plaintiffs have standing to maintain this action. However, before turning to the issue of standing, I should like to comment upon the unusual procedural posture in which East Hartford, West Hartford and Glastonbury ("appellants") now find themselves. The plaintiffs' complaint originally named HUD, its Secretary, its Regional Administrator and its District Director as the only defendants (the "federal defendants"). The local defendants (Farmington, Windsor Locks, Vernon, Enfield and the appellants) were joined as parties by the federal defendants. At the district court level, the defense of this action was dominated by the federal defendants, upon whom the local defendants relied to carry the burden of this litigation. This approach was encouraged by the district judge, who, in order to simplify the proceedings, asked the local defendants to "tag along and support the federal defendant [sic] and take the same position." On January 28, 1976, the district court issued its decision enjoining the local defendants from spending the funds granted under the Block Grant Program. The federal defendants decided not to appeal from that decision because (1) HUD finds the *result* to be consistent with its present practices, (2) the district court's opinion can be read in a manner consistent with HUD's interpretation of its duties under the Act, and (3) the injunction only applies to the seven local defendants. Brief For The Secretary of

Housing and Urban Development Amicus Curiae at 3. With a few minor exceptions, the brief filed by HUD is in general agreement with the decision of the district court and the position taken by the plaintiffs. The issue of standing is not discussed, for it is outside the scope of the brief. *Id.* at 4.

Of the seven local defendants thus left holding the bag, three have appealed. All have now learned the hard way that it is not always a good idea to "tag along" with and "take the same position" as a co-defendant. The three appellants are now represented by counsel who did not participate in any of the proceedings below.

It is relatively easy to see why all of this occurred. HUD, of course has a substantial interest in the manner in which the courts construe the 1974 Act, and so it would naturally want to play a dominant role in any proceeding concerning that Act. The local defendants who were joined as such by HUD would naturally want to rely heavily upon the latter's expertise. This is particularly true where, as here, the district court asks them to do so in order to simplify the proceedings. As a result of what has occurred, however, much has been lost in terms of the sharpening of the presentation of issues upon which the courts rely so heavily. It is not my intention to disparage counsel's presentation, for counsel have, in my judgment, done a fine job in that regard. I wish only to point out that it could have been improved if greater foresight had been shown at the district court level. District courts and private counsel can, and should, be alert to the potentially conflicting interests of private litigants and governmental agencies, but governmental agencies bear a special responsibility in this respect. Because of their expertise in their respective fields, and because of the frequency with which they are likely to encounter problems such as that which has arisen here, governmental agencies are in a superior position to foresee

and avert those problems. It is to be hoped that in the future agencies such as HUD will make some effort to assure that their co-defendants are made aware of possible conflicts of interest so that other litigants will not find themselves in appellants' position.

Turning now to the standing issues presented, I believe a brief restatement of the facts is in order. On April 15, 1976, the Hartford Area Office of the Department of Housing and Urban Development received an application for Community Development Block Grant Assistance filed by the City of Hartford pursuant to the Housing and Community Development Act of 1974. By letter dated June 24, 1975, HUD approved a grant to Hartford in the amount of $10,025,000. Hartford executed a Grant Agreement on July 30, 1975.

The towns of East Hartford, West Hartford and Glastonbury followed much the same procedure in applying for Block Grant Assistance, and they were granted $440,000, $999,000 and $910,000, respectively. Hartford and two of its low-income residents now challenge those grants on the ground that the applications submitted by the towns fail to satisfy one of the requirements of the Act.[1] The majority holds that the plaintiffs have standing to make such a challenge. I cannot agree.

The majority holds that Hartford has satisfied the "injury in fact" test established in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970), because (1) if the grants to the towns are disapproved, there is a "strong likelihood," *ante*, at ——, that

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1 Of the eight municipal governments, including the City of Hartford, who were parties to this action, only one, East Hartford, made any attempt to satisfy the requirement of 42 U.S.C. § 5304(a)(4)(A) (Supp. V 1975). Thus, Hartford and six of the defendant towns entered zero as the number of low-income persons "expected to reside" within their borders. East Hartford entered 135. HUD subsequently reduced this figures to 131.

Hartford will receive reallocated funds under 42 U.S.C. § 5306(e) (Supp. V 1975),[2] and (2) HUD's approval of applications that failed to comply with the statutory requirements "substantially lessen[ed] the probability," *ante*, at ——, that Hartford would benefit from the "spatial deconcentration" objective of the Act.

Assuming, arguendo, that a potential claim to a fund that will not even exist unless plaintiff is successful on the merits can ever satisfy the injury-in-fact test—which appears to require a present injury in addition to a prospective benefit—it is clear that in this case there is not the slightest chance that Hartford will ever receive reallocated funds as a result of this lawsuit. While it may be true that Hartford would have a priority position in applying for reallocated funds, that priority will mean little if there are no funds to reallocate. Despite the indications to the contrary in the majority opinion, Hartford, as the party who asks the Court to assume jurisdiction, bears the burden of proof on the issue of standing, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 44 U.S.L.W. 4724, 4730 (U.S. June 1, 1976), and although Hartford may have proved that it would have a priority position in applying for reallocated funds, it has failed to prove that the intervention of the federal courts will result in the availability of funds for reallocation. The wrong of which Hartford

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2 The complaint does not mention the possibility of obtaining reallocated funds as a prospective benefit of this lawsuit. To find that the plaintiffs have alleged a stake in the outcome sufficient to confer standing on the basis of a prospective benefit that is not even mentioned in the complaint is to grant far greater pleading latitude than prior cases indicate is appropriate. *See Simon* v. *Eastern Kentucky Welfare Rights Organization*, 44 U.S.L.W. 4724, 4728-30 (U.S. June 1, 1976); *Warth* v. *Seldin*, 422 U.S. 490, 501-02 (1975); *United States* v. *SCRAP*, 412 U.S. 669, 688-89 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 734-36 (1972); *Evans* v. *Lynn*, 537 F.2d 571, 592 (2d Cir. 1976) (*en banc*). *See also* 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3531, at 17-18 (Supp. 1976).

complains is HUD's approval of the defendant towns' allegedly defective applications. If Hartford is correct that the applications were defective, and that HUD abused its discretion in approving them, Hartford would not be entitled to relief preventing the defendant towns from ever receiving their grants. Hartford would be entitled only to an injunction pending the submission of acceptable applications—precisely what it sought, and precisely what the district court granted. Such an injunction would result in the availability of funds for reallocation only if the towns forfeited their grants by failing to submit acceptable applications. West Hartford and Glastonbury have already submitted new applications, thereby negating any possible inference that they intend to forfeit their grants —in addition to creating a substantial mootness problem— and there is not the slightest indication that East Hartford has any intention of forfeiting its $440,000 grant by failing to do likewise. It is sheer fantasy to suppose that Hartford will ever receive reallocated funds as a result of the intervention of the federal courts. In my view, Hartford's asserted interest in reallocated funds is even more speculative than the interest found to be not judicially cognizable in *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), and, accordingly, I would hold that it is insufficient to confer standing upon Hartford.[3]

The majority also finds standing on the basis of "a second, less quantifiable," injury suffered by Hartford, *ante*, at ——. That injury is the "bleak" housing situation that exists in Hartford. That situation will be improved, we are told, if the suburbs are required to include accurate "expected to reside" figures in their applications for Block Grants. This injury is insufficient to confer

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3 To the extent that the low-income plaintiffs' claim of standing rests upon their assertion of an interest in reallocated funds, *see ante*, at ——, it too must fail.

standing for three reasons. First, it cannot fairly be said that the housing situation in Hartford is a result of, or can be traced to, the challenged action of the defendants. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 44 U.S.L.W. at 4729. Second, the possibility that the inclusion of accurate "expected to reside" figures will result in the betterment of the housing condition in Hartford is at least as remote and speculative as the possibility in *Linda R.S.* v. *Richard D.*, *supra*, that the prosecution of an unwed father for failing to support his child will result in the payment of support. Third, and more important, Hartford may not properly assert an interest in improving its bleak housing situation in an action against the federal government. The doctrine of *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), places strict limits on the power of states to represent their citizens in actions against the federal government. *See, e.g., Com. of Pa., by Shapp* v. *Kleppe*, 533 F.2d 668 (D.C. Cir.), *cert. denied*, 45 U.S.L.W. 3396 (U.S. Nov. 30, 1976). The power of a political subdivision of a state is even more rigidly circumscribed. As the majority recognizes, *ante*, at ——, a city cannot sue as *parens patriae*, but is limited to the vindication of such of its own proprietary rights as might be congruent with the interests of its residents. *California* v. *Auto. Mfrs. Ass'n, Inc.* (*In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31*), 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). Hartford's assertion of an interest in improving its bleak housing situation is nothing more than an attempt to vindicate a general interest in the social and economic well-being of the citizenry. Even a state would encounter serious difficulties in asserting such an interest against the federal government, and it can hardly be said that this is the sort of proprietary interest which Hartford may assert.

Merely because Hartford may not assert the rights of its citizenry in a representative capacity does not mean that individual citizens may not assert their own rights. Accordingly, I next turn to the claims of the low-income plaintiffs to determine whether they have alleged a stake in the outcome sufficient to confer standing.

The individual plaintiffs in this case are low-income residents of Hartford who live in substandard housing and who have sought, unsuccessfully, to secure affordable housing in the suburbs. There is, of course, no question that an individual who is, effectively, trapped in a slum suffers a serious, present and continuing injury. Abstract injury alone, however, is insufficient to confer standing. *Linda R.S.* v. *Richard D., supra,* 410 U.S. at 618. The injury alleged must fairly be traceable to the challenged action of the defendant, and the desired exercise of the Court's remediable powers must in some perceptible way serve to remove the harm. *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* 44 U.S.L.W. at 4729-30. The majority is correct in holding that the facts of this case are distinguishable from those of *Warth* and *Evans.*[4] However, the distinctions are not great enough, in my judgment, to justify the conclusion reached by the majority.

To begin with, the bleak housing siltuation in Hartford is not the product of HUD's failure to require the defendant towns to include "expected to reside" figures in their applications for Block Grants under the 1974 Act. The housing situation in Hartford was bleak long before 1974. Nor are the specific conditions of which the plaintiffs complain a product of HUD's alleged abuse of discretion. Plaintiff Jordan had been living at her present address for two years as of June 30, 1975, and therefore her plight antedates the Act by roughly one year. Plaintiff Mauldin's

4 *Warth* v. *Seldin,* 422 U.S. 490 (1975); *Evans* v. *Lynn,* 537 F.2d 571 (2d Cir. 1976) (*en banc*).

position is no stronger. She moved to Hartford approximately one month before David Meeker wrote his memorandum "waiving" the requirement of 42 U.S.C. § 5304(a)(4)(A) (Supp. V 1975). Of course, Mrs. Mauldin's plight has nothing to do with acts of Congress or HUD or David Meeker's memorandum. Her plight is the direct result of the fact that her husband became incapacitated. That incapacitation led to his unemployment, which, in turn, led to the loss, through foreclosure, of the family home in the suburban town of Bloomfield.

As indicated above, the injury suffered by the individual plaintiffs is a continuing one. However, because the basic injury of which the plaintiffs complain antedated the action they challenge, they would have standing only if they can allege that their injury has been, or will in fact be, perceptibly aggravated by the challenged action. The plaintiffs have not made, and, indeed, could not make, such an allegation. HUD's failure to require the defendant towns to include "expected to reside" figures in their applications for Block Grants did not make the plaintiffs' situation worse, but merely left it the same. The "waiver" of the requirement by HUD did not have a negative effect. It merely failed to produce the hoped-for positive effect. Thus, the low-income plaintiffs' claim of standing, like that of the City of Hartford, depends not upon a present injury that has been caused by HUD's allegedly unlawful action, but upon a prospective benefit that they hope will accrue if the federal courts intervene and require the inclusion of accurate "expected to reside" figures. The standing *vel non* of plaintiffs with such claims depends upon whether there is a direct nexus between the vindication of their interests and the relief they seek, or whether the prospect that their lot will be improved by the desired exercise of the Court's remedial powers is merely speculative. *See Linda R.S.* v. *Richard D., supra,* 410 U.S. at

618-19. The most recent applications of these standards by the Supreme Court place formidable barriers in the way of actions such as the one now before this Court. *See, e.g., Simon* v. *Eastern Kentucky Welfare Rights Organization, supra.* The plaintiffs have not, in my view, successfully cleared those barriers. It is naive to imagine that plaintiffs' lot will be perceptibly improved merely by coercing the defendant towns into including accurate "expected to reside" figures in their Block Grant applications. The "expected to reside" figure lacks the magical power that would be required to produce such a result. The causes of the housing problems that plague the cities of this Nation are legion. Suggested cures for those problems are complex and equally numerous. The "expected to reside" figure is a new and relatively small part of the federal government's attack on urban housing problems. Its impact on those problems is unknown and unmeasurable. The prospect that it will have the desired impact or that its impact will be perceptible is gossamery.[5] Thus, the complaint does not demonstrate, and the plaintiffs could not possibly show, a substantial likelihood that victory in this suit would result in their securing the adequate, low-cost housing that they desire. *See, Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* 44 U.S.L.W. at 4730. Accordingly, I would hold that the low-income plaintiffs, like the City of Hartford, lack standing to maintain this action.

The judgment of the district court should be vacated and the cause remanded with instructions to dismiss the complaint.

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5 It is true, of course, that Congress expects, or at least hopes, that the "expected to reside" figure will have some impact. However, legislative expectations are not necessarily dispositive in determining whether those expectations are speculative. *See Linda R.S.* v. *Richard D., supra.*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF HARTFORD, MIRIAM JORDAN
and FANNIE MAULDIN,

Plaintiffs-Appellees,

against

TOWNS OF GLASTONBURY, WEST HARTFORD
and EAST HARTFORD,

Defendants-Appellants.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 23rd day of March, 1977, he served two copies of the Supplemental Brief of Appellees on Rehearing En Banc on -- see attached list

the attorneys for see attached list by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. See attached list ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
23rd day of March, 1977.

Courtney J. Brown
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